Written evidence from the Chartered Institute of Arbitrators

How has the court fees regime affected the competitiveness of the legal services market in England and Wales, particularly in an international context?

Introduction

1. The Chartered Institute of Arbitrators (CIArb) is the world's leading professional membership body for arbitration, mediation and alternative dispute resolution (ADR). CIArb promotes the use of ADR internationally through 14,000 professionally qualified members in 133 countries.

2. CIArb has under its Royal Charter a duty in the public interest to promote and facilitate worldwide the determination of disputes by arbitration and alternative means of private dispute resolution other than resolution by the court (collectively called "private dispute resolution").

3. As a truly global body, CIArb has an extensive knowledge base in the area of commercial dispute resolution and information on the attitudes, knowledge and experiences of individuals who bring commercial disputes to the London courts, as well as on the factors which determine the jurisdiction in which such cases are brought.

Executive summary

4. CIArb welcomes the Government’s continued acknowledgement of the important contribution arbitration and other forms of international commercial dispute resolution make to the UK economy. Government recognises that ADR processes also play a key role in supporting a court system under pressure in ensuring that many cases are resolved effectively and efficiently before they enter protracted court procedures.

5. CIArb asserts that the intangible value of England and Wales as the home to an independent, impartial courts system concerned with justice rather than profit cannot be underestimated.

6. Arbitration fees have been used to demonstrate that parties are willing to pay fees well above the rates charged by the courts to help resolve their commercial disputes. Fees in arbitration and court fees are not directly comparable – with arbitration fees largely being paid to the arbitrators involved in a case.

7. Whilst still early to give an accurate assessment, CIArb does not believe the court fees regime will jeopardise the position of England and Wales as a world centre for arbitration and other forms of commercial dispute resolution in the short term.

8. Further changes to the enhanced regime for civil proceedings could have an impact on the reputation of the courts in the long term which in turn could have an impact on the competitiveness of UK legal services in an increasingly crowded market place. This could be manifested in cases going elsewhere but more importantly in other forms of law than English law being utilised for contracts.
9. It is a point of moral principle that the State should provide access to an affordable and fair courts system for the settlement of disputes.

Reputation of the courts system

10. London is a global centre for international commercial dispute resolution. The legal services market contribution to the UK economy is valued at £22.6bn (1.6% of UK GDP). Whilst the reputation of the courts system and that 40% of all governing law in all global corporate arbitrations is English law support its competitiveness, this position should not be taken for granted.

11. Under the enhanced charging power at section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014 the Lord Chancellor must have regard to the competitiveness of the legal services market. The perception that London is host to a full spectrum of highly specialised dispute resolution expertise, including arbitration, enhances the competitiveness and reputation of England and Wales.

12. Courts are a valuable support mechanism for arbitration. The potential negative impact of changes to court fees on the international competitiveness of England and Wales as a world centre for arbitration and other forms of commercial dispute solution must be considered.

13. The court fees regime could well have an impact on the ‘brand image’ of legal services in England and Wales in the long term. The intangible value of the perception that the England and Wales is home to a fair and equitable civil justice system where the rule of law is upheld should not be underestimated.

14. The position of England and Wales (and that of London in particular) as the most preferred and widely used seat for arbitration relies heavily on this perception (a ‘Magna Carta effect’) and parties confidence in the reputation of a respected independent, impartial judiciary who will enforce arbitration awards.

15. If the courts are perceived to simply be a money making machine, that could call into question the fairness and motives of the system (justice or profit) and be a deciding factor when a seat is chosen for dispute settlement.

16. The issue of enforcement is a critical issue, perhaps even more important with regards to competitive position of England and Wales than the fees regime.

17. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), underpins international commercial arbitration by ensuring States that enter into the treaty respect arbitration agreements and enforce them by their court systems.

18. With over 150 countries signed up to the New York Convention, arbitration is therefore not restricted to specific geographic locations and disputes can be settled at locations across the world. London is the world centre for commercial dispute resolution because
its courts have a reputation for enforcing arbitration awards in an independent, impartial manner. Any development that calls this into question would be extremely detrimental to London’s international competitiveness.

19. Government must continue to make clear that the enhanced fees regime for civil proceedings are to ensure the system is upgraded and enhanced, rather than a profit making exercise.

Costs

20. Government cited CIArb’s survey, *CIArb Costs of International Arbitration Survey 2011*, to demonstrate that parties are willing to pay fees well above the rates charged by the courts to help resolve their commercial disputes.

21. CIArb’s 2011 survey highlighted that the UK was the most commonly chosen seat and that party costs were less in the UK than the rest of Europe (common costs - including fees - were over 18% higher in Europe).\(^4\)

22. The 2014 *Court fees: proposals for reform* consultation document states:

“A survey by the Institute of Arbitrators suggested that parties incur legal costs of over £1.5 million in arbitration, including some £100,000 in arbitration fees.”

23. CIArb would reiterate that fees in arbitration and the court fees are not directly comparable – with arbitration fees largely being paid to the arbitrators involved in a case. So whilst the survey highlighted that arbitral fees account for the greater part of common costs to both parties in arbitration, for the production of transcripts, hiring the hearing venue and paying for arbitral expenses, costs did not exceed £15,000 in any category. Arbitrators fees are typically between £300 and £700 an hour (for commercial not investment cases), with up to three arbitrators potentially sitting in judgement on a case.\(^5\)

24. Government has to accept this distinction with regards to any future proposals to reform the fees regime for high value commercial proceedings.

International competition

25. Government must consider increasing competition from other centres of international commercial dispute resolution such as Singapore and New York. The Queen Mary, University of London study, *Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions*, previously commissioned by the Ministry of Justice goes someway to address this.\(^6\)

26. Government should note that Singapore makes a loss on the running costs of its court system in order to drive prices down to attract high value international disputes. Other jurisdictions are actively seeking to attract high value cases with their offering at the same time as the introduction of an enhanced fees regime for civil proceedings in England and Wales.
27. It is right to assert that English law is popular (a 2010 Arbitration Survey by Queen Mary University of London identified that 40% of companies surveyed chose English law for arbitrations and a recent 2013 Queen Mary survey identified that 40% of companies chose English law or England as a seat) but this does not necessarily mean that England will continue to be a popular seat going forward. Disputes with regard to commercial affairs governed by English law can be, and increasingly are, settled overseas. Retired English judiciary are also playing an active role in dispute resolution centres across the Middle East and the Far East.

28. The heavy emphasis on common law comparators (such as Singapore and New York) in the MoJ’s research also requires attention. There needs to be more research on how the system compares with civil law jurisdictions, not least because the system in England and Wales may compare even more favourably with civil law jurisdictions than it does again other common law competitors. This is also particularly important if the European Court were subsequently invited to consider these reforms as restricting access to justice by creating financial barriers to redress.

Conclusion

29. High value cases and arbitration cases form part of a complex dispute resolution ecosystem, further variation in fees within that system could have unintended consequences on the reputation of the whole.

30. CIArb does not believe the court fees regime will jeopardise the position of England and Wales as a world centre for arbitration and other forms of commercial dispute resolution in the short term.

31. The enhanced fees regime for civil proceedings could well have a long term impact on the ‘brand image’ of London as a destination of choice for private dispute settlement.

32. Access to redress should not be merely open to the wealthy. The Lord Chancellor must pay due regard to his fundamental duty to ensure access to the courts is not denied. Whilst it is preferable for the citizen to settle disputes through alternative means of dispute resolution other than the court, we believe the State in a civilised society has an obligation to the citizen to ensure that they have access to redress through a stable and affordable courts system.

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References


